Tengku Azman bin Tengku Adnan & Anor v Hong Leong Bank Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-02(IM)(NCVC)-54–01 OF 2013
ZAHARAH IBRAHIM, ANANTHAM KASINATHER AND MAH WENG KWAI JJCA
15 MAY 2014

Land Law — Charge — Foreclosure — Cause to the contrary — Whether charge increased monthly repayment sums without chargor's consent — Whether chargor not informed of increase in interest rate — Whether balance outstanding sums excessive — Whether chargee in breach by wrongfully terminating banking facility agreement — Finality and conclusiveness of certificate of indebtedness — Whether charge made proper demand for payment of outstanding sums — Whether chargor had shown cause to the contrary

The respondent had granted the appellants loan facilities, in consideration of which, the appellants charged their property in favour of the respondent. The appellants defaulted in their repayment of the loan and the respondent commenced foreclosure proceedings against the charged property. In disputing the respondent's claim, the appellants contended that the respondent had increased the monthly repayment sums without their consent. The appellants also contended that they were not informed of the increase in the interest rate, that the balance outstanding sums were excessive and that the respondent was in breach of the banking facility agreement ('the BFA') when it was wrongfully terminated. The High Court held that the appellants had failed to show 'cause to the contrary' and accordingly granted an order for sale by way of a public auction. The appellants appealed against the said order.

Held, dismissing the appeal with costs of RM10,000:

(1) The respondent was not in breach of the BFA when it increased the respective interest rates. By cl 7 in Annexure 1 to the BFA the respondent had reserved its rights to amend the existing terms and conditions of the contract. By cl 13 in the same annexure, the respondent had reserved its rights to change the base lending rate by giving notice to the appellants. Clause 13 also provided that failure to give notice of any changes shall not prejudice or have the effect of invalidating any such change. In any event, the respondent had given notice to the appellants of the change in interest rate (see paras 8 & 10–12).

(2) The appellants' contention that they were charged excessive interest rates had no merit (see para 13).

(3) The respondent had issued a statement entitled 'Butir-butir Jumlah Terhutang Setakat 3 April 12' to support its claim for the outstanding sum. Although the statement was not entitled or captioned as 'Certificate of Indebtedness' it was nonetheless meant to inform the appellants of the sum outstanding with calculations, as at 3 April 2012. For all intents and purposes, the statement functioned adequately as a certificate of indebtedness issued to the appellants (see para 14).

(4) Apart from complaining that the sum claimed was wrongly calculated by the respondent and was excessive, the appellants did not adduce any evidence to challenge the 'method' of calculation nor the quantum of the outstanding sum. A certificate of indebtedness is deemed to be final and conclusive (see para 14).

(5) The respondent had made the proper demand for payment of the outstanding sums through its former solicitor's letter. The statutory notice in Form 16D was properly served on the appellants. Thus, the respondent had met the conditions precedent in making the application for an order for sale. No cause to the contrary was shown and the court was obliged to make an order for sale (see paras 15–17).

(6) In a foreclosure action, challenges on the calculation of interest under the loan agreement are actually not relevant. On a proper reading of s 256(3) of the National Land Code, the court ought not to enter upon a discussion of the question of whether any or all of those complaints have or are devoid of any merit. The court should only be concerned with the restrictive categories of 'cause to the contrary' as laid down in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 (see para 21).

[Bahasa Malaysia summary

Responden telah memberi perayu kemudahan pinjaman, sebagai balasan bagi yang mana, perayu-perayu mencagarkan harta mereka kepada responden. Perayu-perayu gagal dalam pembayaran balik pinjaman mereka dan responden memulakan prosiding merampas harta terhadap harta yang dicagarkan. Dalam mempertikaikan tuntutan responden, perayu-perayu berhujah bahawa responden telah meningkatkan jumlah wang pembayaran balik bulanan tanpa persetujuan mereka. Perayu juga menegaskan bahawa mereka tidak dimaklumkan mengenai kenaikan kadar faedah, bahawa baki jumlah belum jelas adalah berlebihan dan bahawa responden memungkiri perjanjian kemudahan perbankan ('PKP') apabila ia telah secara salah ditamatkan. Mahkamah Tinggi memutuskan bahawa perayu-perayu telah gagal menunjukkan 'sebab yang berlawanan' dan sewajarnya diberi perintah jualan melalui lelongan awam. Perayu merayu terhadap perintah tersebut.

Diputuskan, menolak rayuan dengan kos sebanyak RM10,000:

(1) Responden tidak melanggar PKP apabila ia meningkatkan kadar faedah

masing-masing. Dengan klausa 7 Lampiran 1 PKP responden telah memelihara haknya untuk meminda terma dan syarat kontrak sedia ada. Dengan klausa 13 lampiran yang sama, responden telah memelihara haknya untuk mengubah *base lending rate* dengan memberikan notis kepada perayu-perayu. Klausa 13 juga memperuntukkan bahawa kegagalan untuk memberi notis terhadap apa-apa perubahan tidak akan memprejudis atau mempunyai kesan pembatalan terhadap apa-apa perubahan itu. Walau bagaimanapun, responden telah memberi notis kepada perayu-perayu tentang pertukaran kadar faedah (lihat perenggan 8 & 10–12).

(2) Hujahan perayu-perayu bahawa mereka dikenakan kadar faedah yang melampau tidak bermerit (lihat perenggan 13).

(3) Responden telah mengeluarkan penyata bertajuk 'Butir-butir Jumlah Terhutang Setakat 3 April 12' untuk menyokong tuntutannya untuk jumlah tertunggak. Walaupun penyata tidak bertajuk atau dikapsyenkan sebagai 'Certificate of Indebtedness' ia tetap bermakna untuk memaklumkan kepada perayu-perayu jumlah tertunggak dengan pengiraan, setakat 3 April 2012. Untuk semua maksud dan tujuan, penyata itu berfungsi secukupnya sebagai sijil keberhutangan yang dikeluarkan kepada perayu-perayu (lihat perenggan 14).

(4) Selain daripada aduan bahawa jumlah yang dituntut telah disalah kira oleh responden dan melampau, perayu-perayu tidak mengemukakan apa-apa keterangan untuk mencabar 'method' pengiraan mahupun kuantum jumlah tertunggak. Satu sijil keberhutangan dianggap muktamad dan konklusif (lihat perenggan 14).

(5) Responden telah membuat tuntutan wajar untuk bayaran jumlah tertunggak melalui surat peguamcaranya yang terdahulu. Notis statutori dalam Borang 16D telah diserahkan dengan betul kepada perayu-perayu. Oleh itu, responden telah memenuhi keperluan terdahulu dalam membuat permohonan untuk perintah jualan. Tiada kausa yang bercanggahan telah ditunjukkan dan mahkamah akur untuk membuat perintah jualan (lihat perenggan 15–17).

(6) Dalam tindakan perampasan, cabaran terhadap pengiraan faedah di bawah perjanjian pinjaman adalah sebenarnya tidak berkaitan. Berdasarkan bacaan s 256(3) Kanun Tanah Negara yang betul, mahkamah tidak patut memasuki perbincangan tentang persoalan sama ada apa-apa atau kesemua aduan-aduan itu mempunyai atau tidak mempunyai apa-apa merit. Mahkamah hanya perlu memberi perhatian kepada kategori sekatan 'cause to the contrary' seperti mana yang dinyatakan dalam kes *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 (lihat perenggan 21).]

Cases referred to

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77; [1997] 2 CLJ 36, SC (refd)

Legislation referred to

National Land Code ss 254, 256(3)

Appeal from: Civil Suit NCVC 24(F)-362–04 of 2012 (High Court, Seremban)

Mohd Farid Ismail (Hamidi & Farid) for the appellant.

Lee Kean Khey, Michael (Kong Yoke San with him) (YM Chin & Partners) for the respondent.

Mah Weng Kwai JCA (delivering jugdment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the learned trial judge given on 19 November 2012 granting an order for sale by way of a public auction in respect of the property held under HS(D) 151346 No PT 21513 Mukim Labu, Daerah Seremban, Negeri Sembilan ('the property') which was charged by the appellants as security to the respondent for a loan facility.

THE RESPONDENT'S CLAIM

[2] In the affidavit in support of its originating summons the respondent stated the following:

(a) on 12 July 2004 the respondent at the request of the appellants issued a letter of offer for a housing loan in the sum of RM240,000 and a term loan in the sum of RM9,414 to the appellants;

(b) in consideration thereof the appellants agreed to charge their property in favour of the respondent. The housing loan was fully drawn down on 10 October 2005;

(c) the appellants defaulted in their repayment of the loan and the respondent's solicitors on 18 November 2010 recalled the loan and terminated the facility;

(d) on 5 April 2011, the respondent served the *notis tuntutan statutori* (*Borang* 16D) pursuant to s 254 of the National Land Code on the appellants; and

(e) the respondent claimed for the outstanding sum of RM311,057.33 together with interest in respect of the housing loan and the sum of RM11,371.03 together with interest in respect of the term loan.

THE APPELLANTS' CASE

[3] In disputing the respondent's claim, the appellants complained that:

(a) the respondent had on 1 June 2010 increased the monthly repayment sums from RM1,713 to RM2,424 in respect of the housing loan and from RM66–RM94 in respect of the term loan, without their consent;

(b) as at April 2010, the balance housing loan outstanding was in the sum of RM266,973.70 and the balance term loan outstanding was in the sum of RM9,883.26 although they had already paid 56 monthly instalments to the respondent. The appellants contended that the balance outstanding sums were excessive and that the respondent was in breach of the banking facility agreement when it was wrongfully terminated; and

(c) they were not informed of the increase in the interest rate.

DECISION OF THE HIGH COURT

[4] The learned trial judge upon hearing the parties held that the appellants had failed to show 'cause to the contrary' and accordingly granted an order in terms of the originating summons to the respondent.

APPEAL BY THE APPELLANTS

[5] Being dissatisfied with the said order the appellants filed their notice of appeal on 18 December 2012.

DECISION OF THE COURT OF APPEAL

[6] Upon reading the *rekod rayuan* and the written submissions of counsel for the appellants and the respondent and upon hearing oral submissions of counsel aforesaid, the court unanimously held that there was no merit in the appeal and dismissed the same with costs.

GROUNDS OF DECISION

[7] The main plank in the appellants' appeal was that the respondent had, in breach of the banking facility agreement, increased the interest rate in respect of the housing loan and term loan without the consent of the appellants.

[8] In our judgment we are of the view that the respondent was not in breach

of the banking facility agreement when it increased the respective interest rates. A

[9] The provisions for the payment of interest rates are clearly spelt out in the banking facility agreement as follows:

> Interest Rate: HL and/or TL B
>
> The rate of interest shall be 1.50% per annum with monthly rest for a period of twelve (12) months commencing after six (6) months from the date of the Letter of Offer or from the date of first draw-down whichever is the earlier (hereinafter referred to as 'the Initial Period'). The rate of interest shall be 5.00% per annum with monthly rest for the next twelve (12) months commencing from the date C immediately following the date of expiry of the Initial Period. Thereafter the rate of interest shall be 0.25% per annum above the prevailing Base Lending Rate (BLR) with monthly rest.
>
> Presently, the BLR is 6.00% per annum. The BLR and the margin of interest are subject to variations from time to time at the Bank's absolute discretion. D
>
> Revision of Interest Rate: Fixed Interest Rate HL and/or TL Period
>
> In the event you commit an event of default, the fixed rate of interest shall be converted into a floating rate of interest at the rate of 1.25% per annum above the prevailing Base Lending Rate with monthly rest on the 1st day of the 4th month if E you default in the payment of interest or instalments for a continuous period of three (3) months or by such other rate as may be determined by the Bank from time to time and such revised rate shall apply to all instalments or remaining instalments, as the case may be, without further notice to you notwithstanding any provisions contained herein and without prejudice to the Bank's right to recall the Facility on demand. F
>
> Should the interest rates be so revised, the Bank shall be entitled to make the necessary adjustments to the instalments or remaining instalments by varying the amount of each instalments or by varying the number of instalments by varying in any other manner as the Bank shall deem fit.
>
> Late Payment Interest: HL and/or TL G
>
> In the event payment is not made on the due date, an additional interest at the rate of 1.00% or, any other rate as may be imposed by the Bank shall be levied by the Bank on the payment in arrears, calculated from the date of such default until the date of payment. Such additional interest on late payment is subject to a minimum H of Ringgit Malaysia Ten (RM10-00), or any other minimum amount as the Bank may impose and shall be calculated on a monthly basis.

[10] Further, by cl 7 in Annexure 1 to the banking facility agreement the respondent had reserved its rights to amend the existing terms and conditions I of the contract. Specifically cl 7 provides:

> 7. The Bank reserves the right to amend the existing terms and conditions and to stipulate additional terms and conditions by notices in writing to the Borrower at the address herein given or at the last address known to the Bank and any such

amended terms and conditions shall take effect from the date specified in the notice.

[11] And by cl 13 in the same annexure, the respondent had reserved its rights to change the base lending rate by giving notice to the appellants. Clause 13 also provided that failure to give notice of any changes shall not prejudice or have the effect of invalidating any such change. The full text of cl 13 reads:

> 13. The Bank shall give notice of the change in the Base Lending Rate (BLR) or in the margin of interest over and above the BLR to you and/or any obligor *but failure* by the Bank to give such notice shall not prejudice or have the effect of invalidating any such change. Notice by the Bank may take any form and an advertisement in one issue of the daily national newspaper addressed to the general public or a notice posted in the Branch premises stating such change and its effective date of change is deemed sufficient notice to you and any obligor. (Emphasis added.)

[12] In any event in the present case it is clear that as a matter of fact the respondent had given notice to the appellants of the change in interest rate by its letter dated 24 May 2010 (see *rekod rayuan* p 176).

[13] We are also of the view that the contention by the appellants that they were charged excessive interest rates has no merit in light of the following:

(a)	1 February 2006	—	the loan interest rate was revised to BLR + 1.25% as per revision of interest clause;
(b)	1 March 2006	—	second revision of the loan interest rate to BLR + 2.25%;
(c)	1 April 2006	—	third revision of the loan interest rate to BLR + 3.5%;
(d)	26 April 2010	—	the respondent had in its letter fully explained the instalment commencement date and the commencement date of tier rates to the appellants (*rekod rayuan* p 173);
(e)	16 May 2010	—	the respondent sent a final reminder to the appellants on the arrears of the overdue instalments;

(f) 24 May 2010 — the respondent in its letter informed the appellants of the revision of the housing loan repayment instalments following the revision of the base lending rate from 6.05%pa to 9.55%pa, with effect from 19 May 2010. The appellants were informed that as at 19 May 2010, the total loan outstanding was RM240,626.83 with a revised instalment payment of RM2,424 per month with effect from 1 June 2010 (*rekod rayuan* p 176);

(g) 24 May 2010 — the respondent in its letter similarly informed the appellants of the revision of the term loan repayment instalments following the revision of the base lending rate from 6.05% pa to 9.55% pa with effect from 19 May 2010. The appellants were also informed that the total term loan outstanding as at 19 May 2010 was RM9,000.91 with a revised instalment payment of RM94 per month with effect from 1 June 2010.

The appellants, however, after having been amply informed of the increase refused and/or omitted to make any further instalment payments from May 2010 and thereafter to the respondent; and

(h) 5 May 2011 — the respondent in para 2 of its letter informed the appellants of an increase in the interest rate due to their non-payment of the monthly instalments to wit:

> 2. As a result of the above non-payment, the interest rate had been revised from 0.25% + BLR (Base Lending Rate) to 3.50% + BLR between the period from 01/02/2006 to 01/04/2006 as provided in the Letter of Offer dated 12/07/2004 under the Clause — Revision of Interest Rate.

Notwithstanding the above notifications by the respondent, we are of the view that by virtue of cll 7 and 13 of the annexure to the banking facility agreement, the contention by the appellants that there was no notice of variation of the base lending rate is immaterial as even a failure to give such notice shall not absolve the appellants from their obligation to pay interest at the prescribed rate.

CERTIFICATE OF INDEBTEDNESS

[14] The respondent had issued a statement entitled 'Butir-butir Jumlah Terhutang Setakat 3/4/12' to support its claim for the outstanding sum (see *rekod rayuan* p 145). Although the statement was not entitled or captioned as 'Certificate of Indebtedness' it was nonetheless meant to inform the appellants of the sum outstanding with calculations, as at 3 April 2012. The court was satisfied that for all intents and purposes, the statement functioned adequately as a certificate of indebtedness issued to the appellants. Apart from complaining that the sum claimed was wrongly calculated by the respondent and was excessive, the appellants did not adduce any evidence to challenge the 'method' of calculation nor the quantum of the outstanding sum. Accordingly, and in light of the decision in the case of *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544 (FC), a certificate of indebtedness is deemed to be final and conclusive. It was held in *Cempaka Finance* that 'a certificate of indebtedness operates in the field of adjectival law, excusing the plaintiff from adducing proof of debt and shifting the burden onto the defendant to disprove the amount claimed'.

THE DEMAND

[15] The respondent had made the proper demand for payment of the outstanding sums through its former solicitor's letter of 18 November 2010 (see letter of M/s Chew Kar Meng, Zahardin & Partners at *rekod rayuan* pp 136–137).

[16] The statutory notice in Form 16D dated 5 April 2011 was properly served on the appellants by its present solicitors M/s YM Chin & Partners by letter dated 5 April 2011 (see *rekod rayuan* pp 138–139).

[17] Thus, the respondent had met the conditions precedent in making the application for an order for sale. No cause to the contrary was shown and the court was obliged to make an order for sale.

[18] The court notes that the appellants had failed to adduce any evidence at all to support their allegation that the respondent had breached the banking facility agreement of 12 July 2004.

[19] In light of the above it cannot be gainsaid that the appellants had failed to discharge their burden to show any 'cause to the contrary' to warrant the court to dismiss the respondent's originating summons for an order of sale pursuant to s 256(3) of the National Land Code.

[20] In the Supreme Court case of *Low Lee Lian v Ban Hin Lee Bank*

Bhd [1997] 1 MLJ 77; [1997] 2 CLJ 36, it was held that it was not sufficient for the chargor to allege mere breaches by the chargee of the loan agreement or even the terms of the annexure to the charge in order to resist an application under s 256(3) of the National Land Code.

[21] It was further held that in a foreclosure action, challenges on the calculation of interest under the loan agreement are actually not relevant. On a proper reading of s 256(3), the court ought not to enter upon a discussion of the question of whether any or all of these complaints have or are devoid of any merit. The court should only be concerned with the restrictive categories of 'cause to the contrary' as laid down in *Low Lee Lian* as follows:

The three categories referred to are:

(a) A chargor who is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s 340 of the Code;

(b) A chargor who is able to demonstrate that the chargee has failed to meet the conditions precedent for the making of an application For an order for sale, for example failure of service of Form 16D or failure to prove the making of a proper and valid demand; and

(c) A chargor who is able to demonstrate to the court that the grant of an order for sale would be contrary to some rule of law or equity.

[22] In *Low Lee Lian* it was also held that as the charge action is an action *in rem* that is, against the property per se and not an action in personam, the chargor cannot raise the defence that the chargee's claim is excessive and in breach of the terms of the charge especially on the interest rate payable. Any such claims should be made the subject matter of a separate civil claim by the chargor against the chargee to settle issues relating to the debt. In a statutory sale on a charge action, the chargee is not attempting to sue the borrower to recover the debt but merely exercising his statutory remedy against the chargor.

CONCLUSION

[23] In the result, this court finds that the appellants have not remedied their breach since May 2010 to date and have failed to show any 'cause to the contrary' to the respondent's application.

[24] Accordingly, the appeal was dismissed with costs of RM10,000.

Appeal dismissed with costs of RM10,000.

Reported by Kanesh Sundrum